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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/598,908	07/25/2007	Sylvie Tournade	3712036.00755	1892
29157	7590	10/04/2011	EXAMINER	
K&L Gates LLP P.O. Box 1135 CHICAGO, IL 60690			ARIANI, KADE	
			ART UNIT	PAPER NUMBER
			1651	
			NOTIFICATION DATE	DELIVERY MODE
			10/04/2011	ELECTRONIC

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

chicago.patents@klgates.com

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>	
	10/598,908	TOURNADE ET AL.	
	<b>Examiner</b>	<b>Art Unit</b>	
	KADE ARIANI	1651	

**-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 30 June 2011.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ An election was made by the applicant in response to a restriction requirement set forth during the interview on \_\_\_\_; the restriction requirement and election have been incorporated into this action.
- 4) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 5) ☒ Claim(s) 1-11, 13 and 14 is/are pending in the application.
- 5a) Of the above claim(s) 8-11, 13 and 14 is/are withdrawn from consideration.
- 6) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 7) ☒ Claim(s) 1-7 is/are rejected.
- 8) ☐ Claim(s) \_\_\_\_ is/are objected to.
- 9) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 10) ☐ The specification is objected to by the Examiner.
- 11) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 12) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |   |   |
|---|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-302)                    | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. ____.                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)         | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date ____.   | 6) <input type="checkbox"/> Other: ____.                          |

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***DETAILED ACTION***

The amendment filed on June 30, 2011, has been received.

Claims 1-11, 13 and 14 are pending in this application, claims 8-11, 13, and 14 are withdrawn from consideration, and claims 1-7 are examined on their merits.

***Answer to Arguments***

Applicant's arguments with respect to rejections of claims 1-7 filed on 06/30/2011 have been considered but are not found persuasive.

Applicant's argues that Fleming is directed to vegetables and not a liquid product, and the pH 4.5 of brine solution disclosed by Fleming is not the pH of products (see p. 7 2<sup>nd</sup> paragraph lines 1-6 of Remarks filed on 06/30/2011).

These arguments are considered but are not found persuasive because Fleming is directed to storage of brined vegetables (vegetables in a liquid), a water-based liquid product, and the pH disclosed by Fleming is the pH of product (vegetables + brine), therefore Fleming discloses both a water-based liquid product and the claimed pH, as required by amended claim 1.

Moreover, as mentioned immediately below (new matter rejection) the recitation "pH from about 4 to about 7.5" in claim 1 line 2, raise the issue of new matter. The rejections are maintained for the reasons mentioned immediately above, and in the absence of evidence to the contrary.

***Claim Rejections - 35 USC § 112***

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

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Claim 1 is rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.

The added material which is not supported by the original disclosure is as follows:

In claim 1 line 2, "pH from about 4 to about 7.5".

Because specification does not provide support for a liquid product ....having a pH from about 4 to about 7.5".

The paragraph cited by Applicants page 7 lines 2-4 of the specification (page 5 4<sup>th</sup> paragraph line 5 of Remarks filed on 6/30/2011) recites (copied from the specification):

A decrease in one pH point may be illustrated at the example of a pH decrease of from 7.0 to 6.0, or from 6.5 to 5.5. A decrease in 2 pH points may be a decrease from pH 6.7 to pH 4.7, for example.

### ***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1, 4-7 rejected under 35 U.S.C. 102(b) as being anticipated by Fleming et al. (Journal of Food Science 1983, Vol. 48, p.975-981).

Fleming et al. disclose a liquid product which is water-based (a brine product) comprises living microorganisms having a shelf-life of at least 1 month at 10°C, during which the pH is decreasing less than 2 points and is free of carbohydrates that can be metabolized by the microorganisms,

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microorganisms are from genus *Lactobacillus*, and the product at 20 °C experiences a decrease in pH of less than 2 points (brined vegetables fermented with *Lactobacillus plantarum* all fermentable sugars were removed and is stable during 12 months storage at room temperature, 24 °C and at pH 3.3 or pH 3.8) (Abstract, p.978 2<sup>nd</sup> column 2<sup>nd</sup> paragraph, and p. 979 1<sup>st</sup> column "Discussion" lines 1-12), the pH of the product at the beginning of storage is 4 or higher (brine pH 4.5 and 4.3) (p.976 1<sup>st</sup> column 2<sup>nd</sup> paragraph line 10 and p.976 2<sup>nd</sup> column last paragraphs lines 5 and 13). It must be noted that *Lactobacillus plantarum* is a probiotic.

Fleming et al. therefore clearly anticipate the claimed invention.

### ***Claim Rejections – 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-7 are rejected under 35 U.S.C. 103(a) as being unpatentable over Fleming et al. (Journal of Food Science 1983, Vol. 48, p.975-981) and Reniero et al. (WO 00/53202).

As mentioned immediately above, Fleming et al. teach a liquid product which is water-based comprises living microorganisms having a shelf-life of at least 1 month at 10 °C, during which the pH is decreasing less than 2 points and the product is free of carbohydrates that can be metabolized by the microorganisms, microorganisms are from genus *Lactobacillus*, a probiotic, the product at 20 °C experiences a decrease in pH of less than 2 points (brined vegetables fermented with *Lactobacillus plantarum* all fermentable sugars were removed and is stable during 12 months storage at room temperature, 24 °C and at pH 3.3 or pH 3.8) (Abstract, p.978 2<sup>nd</sup> column 2<sup>nd</sup> paragraph, and p. 979 1<sup>st</sup> column "Discussion" lines 1-12), the pH of the product at the beginning of storage is 4 or higher (pH 4.5) (p.976 1<sup>st</sup> column 2<sup>nd</sup> paragraph line 10).

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Fleming et al. do not teach the product comprising milk proteins, and microorganisms do not metabolize lactose. However, Reniero et al. teach a liquid product which comprises living microorganisms/, having a shelf-life of at least 1 month at 10°C, and during the 1 month at 10°C period the amount of living bacteria decreases less than 2 log-units, the microorganism is a *Lactobacillus* (a cereal drink comprising *L. casei* CNNM I-2116 or ST11 which is stored at 10°C for 30 days, and the survival rate after 30 days less than 2 log units) (page 29 of the "PDF" Figure 3.), Reniero et al. teach a *Lactobacillus*, *L. casei* CNNM I-2116, (p.23 claim 6). It must be noted that *L. casei* CNNM I-2116 or ST11 does not use (metabolize) lactose. Reniero et al. further teach milk (milk proteins) can be added to the product (p. 24 claim 14). Reniero et al. teach *L. casei* CNNM I-21 (a probiotic) is capable of utilizing carbohydrates sucrose and glucose, and further teach acidification of the medium after supplementing the growth medium of *L. casei* CNNM I-2116, with sucrose and glucose (please note that the pH of the medium drops from 6.50 to 5.50 and continues to drop to pH 4.0 when sucrose and glucose are included in the growth medium) (see page 28 of the PDF Figure 2. acidification of *L. casei* ST11 or CNNM I-2116, pH vs. fermentation time in hours).

Therefore, a person of ordinary skill in the art at the time the invention was made would have been motivated to apply the prior art teachings and not to include the carbohydrates that can be metabolized by the microorganism in the liquid product as taught by Reniero et al. in order to provide a liquid product which is milk-based and comprises a microorganism having a shelf-life of at least 1 month at 10°C, and during the 1 month at 10°C the amount of living bacteria decreases less than 2 log-units, which is free of carbohydrates that can be metabolized by the microorganisms. Because Reniero et al. teach the presence of carbohydrates (sucrose and glucose) that can be utilized by the *Lactobacillus*, *L. casei* CNNM I-21 increases the acidification (drop in pH) of the medium, and because Fleming et al. teach removing the fermentable sugars from the liquid product comprising a microorganism makes the liquid product microbiologically stable during the storage for 12 months at room temperature/24°C, and at pH 3.3 or pH 3.8.

### **Conclusion**

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No claims are allowed.

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kade Ariani whose telephone number is (571) 272-6083. The examiner can normally be reached on IFP.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael Wityshyn can be reached on (571) 272-0926. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/KADE ARIANI/  
Primary Examiner, Art Unit 1651